

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 17-11-1995.

CRIMINAL APPEAL NO. 1351 OF 1984

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?
2. To be referred to the Reporter or not ?
3. Whether Their Lordships wish to see the fair copy of Judgment ?
4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
5. Whether it is to be circulated to the Civil Judge?

Shri S.T. Mehta, Addl. Public Prosecutor for the appellant State.

Shri P.B. Bhatt, Advocate for the respondents.

Coram: A.N. Divecha, J. & H.R. Shelat, J.
(17-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

The respondent in Sessions Case No. 42 of 1983, before the Court of the Sessions Judge of Kutchchh at Bhuj, came to be acquitted on 31st July 1984 of the offences under Section 147, 148, 302; and in the alternative u/s. Section 302 read with Section 149 of the Indian Penal Code, and therefore the State has preferred the appeal against the order of acquittal.

2. Sulaiman Jamal Sodha who is alleged to have been murdered

was the police constable against whom several cases were lodged and one sessions case was also pending against him, and because of that pendency he was suspended. Prior to his suspension he used to raid the distillery of Noor Mamad Puna and therefore Noor Puna was hovering. On 24th February 1983 Sulaiman Jamal had to attend the Court in connection with the case pending against him. His fellow constable Kishorsinh and one Mahendrakumar were going to the Court on foot. At 11.00 a.m. they were passing by Hemlata Park. At that time one ambassador car came from Anjar side and went ahead upto a little distance but suddenly took a turn and came back and was stopped near Sulaiman Jamal and his companions. Noor Puna, a man called Pavli and three others alighted from the car. Noor Puna was armed with a knife, Pavli was armed with a stick, and out of three others, two were armed with sticks and the last one was armed with an axe. Noor Puna challenged Sulaiman Jamal and then assaulted him with the knife. The nose of Sulaiman Jamal was cut off. Rest accompanying Noor Puna also assaulted with the weapons they were having and giving the blows they caused serious injuries to Sulaiman Jamal. The persons nearby assembled there and the respondents left the place. Sulaiman Jamal was taken to the hospital at Anjar for the treatment where one senior police sub-inspector recorded his complaint. The Executive Magistrate was also informed to record the dying declaration. The senior police sub-inspector then registered the complaint and investigated into the case. At the conclusion of the investigation a charge-sheet against the respondents for the aforesaid offences was filed before the Court of the Judicial Magistrate, First Class at Anjar. The learned Magistrate at Anjar did not have the jurisdiction to hear and decide the case. He therefore committed the case to the Court of Sessions at Bhuj for hearing and disposal in accordance with law. The then learned Sessions Judge at Bhuj hearing the parties framed the charge at Exh.1. The respondents pleaded not guilty and claimed to be tried. The prosecution-appellannt adduced necessary evidence so as to establish the charge. At the conclusion of the trial, the learned Judge below appreciating the evidence found that guilt was not brought home to the respondents and acquitted them with which they were charged. It is against that judgment and order of acquittal, the State has preferred this appeal before us.

3. The State has assailed the judgment and order acquitting the respondents submitting that the learned Judge did not appreciate the evidence properly; there was dying declaration at Exh. 17; and that was sufficient to connect the respondents with the guilt. Over and above, Mr. Mehta, the learned Addl. Public Prosecutor also relied upon the evidence of Mulji Nanabhai recorded at Exh.16 and Jamalbhai recorded at Exh.18 (father of the deceased). Before we deal with the evidence on which reliance is placed, it may be stated at this stage that the evidence of other witnesses recorded is not material as it throws

no light on the proposition, and it may also be stated that Kishorsinh who was accompanying the deceased at the time of the alleged incident has not been examined, while Mahendrakumar has turned hostile. The panchas have also not supported the case of the prosecution. Under the circumstances, we have to weigh the evidence of Muljibhai and Jamalbhai along with the dying declaration, and to an extent the evidence of Ayishabai the widow of the deceased.

4. True that in law even if no one supports the case of the prosecution, the Court can base the conviction solely on the dying declaration, provided it is appealing and convincing, free from doubt, is made in the fit state of mind, and leads to the guilt of the accused. In this case, the dying declaration recorded at Exh.17 when perused does not inspire confidence. Doctor Vayda has no doubt at the bottom of the dying declaration certified that the deceased when made the declaration was in the fit state of mind and was in a position to make such statement. Whether the deceased was in a fit state of mind is the fact called in question and therefore the evidence of Ayishabai and Jamalbhai must be looked into. Dr. Vayda died thereafter and therefore prosecution could not examine him. After Dr. H.N. Vayda (at present not alive) certified the consciousness of the deceased Dy. Mamlatdar Muljibhai Naranbhai recorded the dying declaration (Ex.17) Jamal, the father of the deceased, has no doubt supported the case of the prosecution saying that when he went to the hospital, the deceased was conscious and was in a position to make the statement. However such evidence does not seem to be credible. The widow of the deceased Ayishabai does not support the fact of her husband's fit state of mind. According to her when she rushed to the hospital after coming to know about the assault on her husband, she did not ask any question to her husband and no talk took place with her husband and at that time no one was present. She has also made it clear that Jamalbhai, her father-in-law, had been to the hospital but when Jamalbhai reached to the hospital the deceased was not in a position to make any statement. When both the nearest relatives thus run counter to each other, a reasonable suspicion arises with regard to the fit state of mind and therefore we would be slow in placing any reliance on the dying declaration. The evidence of the Dy. Mamlatdar shows that before he started to record the dying declaration he caused the P.S.I., policemen and friends of the deceased to leave the ward. The possibility of tutoring or briefing cannot be ruled out. The learned Judge below has in the judgment in Para 22 elaborately discussed the dying declaration, and has in view of such facts rightly concluded that the same is neither appealing nor credible. When the dying declaration being incredible is kept aside, there is no other evidence on record which would bring the guilt home to the accused.

5. Of course, Mr. Mehta, the learned Addl. Public Prosecutor made a lame attempt by submitting that the report of the Chemical Analyser would be sufficient to connect the respondents with the guilt but it is not auriferous. We may mention at this stage that looking to the apathy of the people the prosecution has to retreat in many cases but because of the march of science now-a-days, the prosecution can certainly rely upon the result of the analysis as per the scientific theories, or test, but in this case the report of the Chemical Analyser is of no use to the prosecution. The blood-group of the deceased was 'A'. The police could seize the knife and that was sent to the Chemical Analyser, but thereon no blood-stain was detected. The bush-shirt put on by respondent No.1 at that time was also seized. The Chemical Analyser found human blood thereon, but the group thereof was found inconclusive. Thus, the report of the Chemical Analyser with regard to the muddamal cannot help the prosecution as it leaves us in the lurch.

6. At this stage, the learned Additional Public Prosecutor draws our attention to the evidence of Jamalbhai Dungarbhai, the father of the deceased, before whom the deceased is said to have made the statement against respondents. That statement cannot be relied upon, because as observed earlier, we have found that consciousness, ability, and fit state of mind to make statement is not clearly established; on the contrary its credibility is impeachable.

7. Hemtuji Bhagwanji has been examined at Exh.39. He was also serving with the deceased. It is the case of the prosecution that the deceased, because of his sincerity in the discharge of his duties was receiving threats from bootleggers, other mischief-mongers or wrongdoers in the city including the respondents, but Hemtuji Bhagwanji does not support the case of threat. In the dying declaration at Exh.17 the deceased has stated that once he received a threat through Hemtuji Bhagwanji but on that point also Hemtuji Bhagwanji, is silent. Thus, the prosecution does not get support from any of the witnesses, and therefore we are of the view that the learned Judge below has rightly appreciated the evidence before him on record and concluded in favour of the respondents.

8. It transpires from the evidence of Hemtuji Bhagwanji that the deceased was having enmity with many and therefore it is possible that some one might have done the wrong and the respondents under the mistaken impression or out of animosity came to be involved in the matter. Under the circumstances, we see no reason to interfere with the judgment and order of acquittal passed by the lower Court. The same are required to be maintained. The appeal, therefore, being devoid of merits is required to be dismissed. We accordingly dismiss the appeal.

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